

**A Iekmal Hisham bin Harun lwn Siti Norfauziah bt Setapa dan
lain-lain**

B MAHKAMAH TINGGI (IPOH) — GUAMAN SIVIL
NO AA-21NCVC-4-03 TAHUN 2019
BHUPINDAR SINGH PK
27 JANUARI 2023

C *Tort — Penahanan salah — Tuntutan ganti rugi — Defendan pertama memalsukan minit dan tandatangan dalam kertas siasatan — Plaintiff ditahan secara salah akibat perbuatan salah defendan pertama — Sama ada plaintiff berjaya membuktikan kes — Sama ada tuntutan ganti rugi wajar dibenarkan*

D *Tort — Tanggungan vikarius — Liabiliti — Defendan pertama memalsukan minit dan tandatangan dalam kertas siasatan — Plaintiff ditahan secara salah akibat perbuatan salah defendan pertama — Sama ada perbuatan dilakukan dalam perjalanan pekerjaan — Sama ada defendan kedua hingga keempat bertanggungjawab secara vikarius terhadap perbuatan salah defendan pertama*

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Defendan pertama yang merupakan seorang polis berpangkat Inspektor dan pegawai penyiasat narkotik telah menangkap plaintiff dan membuka kertas siasatan di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB'). Selepas itu, permohonan reman ke atas plaintiff telah dibuat di mahkamah majistret dan majistret telah meluluskan reman selama enam hari. Seterusnya, reman plaintiff disambung selama enam hari lagi. Plaintiff telah dituduh di mahkamah majistret di bawah s 39B ADB dan plaintiff telah ditahan di penjara. Timbalan Pendakwa Raya ('TPR') telah membuat satu laporan polis yang menzahirkan bahawa minit dalam kertas siasatan telah dipalsukan kerana tulisan pada minit tersebut bukan tulisan beliau. Pertuduhan terhadap plaintiff juga telah dipinda daripada s 39B ADB kepada s 12(2)(3) ADB sebanyak tiga pertuduhan. Plaintiff telah mengaku bersalah dan dijatuhkan hukuman penjara. Akibat daripada laporan polis yang dibuat oleh TPR, defendan pertama telah ditahan dan kemudiannya dituduh di bawah ss 211, 466 dan 471/466 Kanun Keseksaan. Setelah didapati bersalah defendan pertama telah dijatuhkan hukuman penjara dan dijatuhkan hukuman 'buang kerja' oleh Lembaga Tatatertib Polis Diraja Malaysia. Plaintiff membawa tindakan terhadap defendan-defendan untuk penyalahgunaan kuasa oleh defendan pertama dan penahanan salah. Plaintiff menuntut ganti rugi am bagi tempoh dia ditahan secara salah dan ganti rugi teladan daripada defendan-defendan. Plaintiff menuntut ganti rugi untuk penahanan salah bagi tempoh 106 hari iaitu dari 21 November 2016 hingga 7 Mac 2017. Tempoh ini bermula dari tarikh plaintiff dituduh di mahkamah di bawah s 39B ADB dan seterusnya ditahan di

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penjara sehingga plaintif mengaku salah terhadap pertuduhan pindaan di bawah s 12(2) ADB. Menurut plaintif semasa defendan pertama melakukan pemalsuan tersebut, dia ialah pegawai penyiasat kes plaintif yang berada di bawah kawalan defendan kedua dan ketiga, dan majikannya ialah defendan keempat. Oleh itu, defendan keempat bertanggung secara vikarius sebagai majikan terhadap perbuatan salah defendan pertama.

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Diputuskan, membenarkan tuntutan:

- (1) Tindakan untuk membuat catatan minit dalam kertas siasatan adalah sangat berkait rapat dengan perjalanan pekerjaan defendan pertama. Kerja untuk memastikan minit dalam kertas siasatan disediakan dalam tempoh yang ditentukan dan kertas siasatan dirujuk kepada TPR ialah tugas rasmi defendan pertama, tetapi dia telah memalsukan minit TPR kerana ingin bercuti. Tindakan pemalsuan dibuat oleh defendan pertama dilakukan semasa melaksanakan skop tugasnya. Pemalsuan minit ini dalam kertas siasatan tersebut adalah sangat berkait rapat dengan perjalanan pekerjaan defendan pertama. Oleh itu, defendan kedua hingga keempat yang merupakan majikan dan prinsipal defendan pertama hendaklah bertanggung secara vikarius atas perbuatan defendan pertama. Maka, tuntutan plaintif terhadap defendan kedua hingga keempat dibenarkan (lihat perenggan 28, 30–31 & 33).
- (2) Terdapat penyalahgunaan kuasa oleh defendan pertama sebagai pegawai penyiasat kes dalam perjalanan pekerjaannya. Akibat perbuatan salah defendan pertama, plaintif telah dituduh bawah s 39B ADB dan ditahan di penjara hingga pindaan pertuduhan dibuat oleh pihak pendakwaan. Oleh itu, plaintif telah ditahan secara salah dari 21 November 2016 hingga 7 Mac 2017. Plaintif telah berjaya membuktikan kesnya atas imbalan kebarangkalian terhadap defendan pertama. Oleh itu, tuntutan plaintif terhadap defendan pertama dibenarkan (lihat perenggan 39–40).
- (3) Plaintif mengalami kemudaratan kerana hak asasinya dicabul oleh defendan pertama dengan pemalsuan catatan dalam kertas siasatan yang mengakibatkan kebebasan diri plaintif tergugat. Jumlah RM3.18 juta bagi penahanan salah yang dituntut oleh plaintif adalah sangat tinggi dan melampau. Plaintif tidak mengemukakan sebarang keterangan mengenai apa-apa penyeksan dan penderaan yang dialaminya semasa dia ditahan. Ganti rugi am yang adil dan munasabah untuk penahanan salah adalah RM2,000 sehari, selama 106 hari menjadikan jumlah ganti rugi am sebanyak RM212,000. Hal keadaan kes ini juga mewajarkan plaintif diberi ganti rugi teladan. Jumlah ganti rugi teladan sebanyak RM1 juta yang dituntut oleh plaintif merupakan jumlah yang terlalu tinggi. Plaintif tidak mengemukakan sebarang keterangan lain bagi menyokong jumlah ganti rugi teladan yang dituntut. Jumlah ganti rugi teladan yang

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A munasabah ialah RM30,000. Defendan-defendan diperintahkan membayar kos sebanyak RM25,000 kepada plaintif (lihat perenggan 46–47, 49, 55–56 & 61).

[English summary]

B The first defendant who was a police inspector and narcotics investigation officer arrested the plaintiff and opened an investigation paper under s 39B of the Dangerous Drugs Act 1952 ('the DDA'). Subsequently, an application for remand on the plaintiff was made in the magistrate's court and the magistrate approved the remand for six days. Later, the plaintiff's remand was continued
C for another six days. The plaintiff was charged in the magistrate's court under s 39B of the DDA and the plaintiff was held in prison. The Deputy Public Prosecutor ('DPP') had made a police report which revealed that the minutes in the investigation papers had been forged because the writing on the minutes
D was not her writing. The charge against the plaintiff was also amended from s 39B of the DDA to s 12(2)(3) of the DDA amounting to three charges. The plaintiff pleaded guilty and was sentenced to prison. As a result of the police report made by the DPP, the first defendant was arrested and subsequently charged under ss 211, 466 and 471/466 of the Penal Code. After being found
E guilty the first defendant was sentenced to prison and sentenced to 'dismissal' by the Royal Malaysian Police Disciplinary Board. The plaintiff brought an action against the defendants for abuse of power by the first defendant and false imprisonment. The plaintiff claimed general damages for the period he was wrongfully detained and exemplary damages from the defendants. The
F plaintiff claimed damages for false imprisonment for a period of 106 days, from 21 November 2016 to 7 March 2017. This period started from the date the plaintiff was charged in court under s 39B of the DDA and subsequently detained in prison until the plaintiff pleaded guilty to the amended charge under s 12(2) of the DDA. According to the plaintiff when the first defendant
G committed the forgery, she was an investigating officer of the plaintiff's case who was under the control of the second and third defendants, and her employer was the fourth defendant. Therefore, the fourth defendant was vicariously liable as an employer for the wrongdoing of the first defendant.

H **Held**, allowing the claim:

(1) The act of making minute entries in the investigation paper was very closely related to the course of the first defendant's employment. The work of ensuring that the minutes in the investigation papers were prepared within the specified period and the investigation papers were referred to the DPP was the official duty of the first defendant, but she
I had forged the DPP's minutes because she wanted to go on leave. The act of forgery committed by the first defendant was committed while performing the scope of her duties. The forgery of these minutes in the said investigation paper was very closely related to the course of

employment of the first defendant. Therefore, the second to fourth defendants who were the employers and principals of the first defendant shall be vicariously liable for the actions of the first defendant. Therefore, the plaintiff's claim against the second to fourth defendants was allowed (see paras 28, 30–31 & 33).

- (2) There was an abuse of power by the first defendant as an investigating officer of the case in the course of her employment. As a result of the wrongdoing of the first defendant, the plaintiff was charged under s 39B of the DDA and held in prison until the charges were amended by the prosecution. Therefore, the plaintiff was wrongfully detained from 21 November 2016 to 7 March 2017. The plaintiff had successfully proved his case on the balance of probabilities against the first defendant. Therefore, the plaintiff's claim against the first defendant was allowed (see paras 39–40).
- (3) The plaintiff suffered harm because his fundamental rights were violated by the first defendant by forging entries in the investigation paper which resulted in the plaintiff's personal freedom being threatened. The amount of RM3.18m for wrongful detention claimed by the plaintiff was too high and extreme. The plaintiff did not present any evidence regarding any torture and abuse he suffered while he was detained. A fair and reasonable general damage for wrongful detention was RM2,000 per day, for 106 days making the total general damages amounted to RM212,000. The circumstances of this case also justified the plaintiff being given exemplary damages. The amount of exemplary damages of RM1m claimed by the plaintiff was an excessive amount. The plaintiff did not submit any other evidence to support the amount of exemplary damages claimed. A reasonable amount of exemplary damages was RM30,000. The defendants were ordered to pay costs of RM25,000 to the plaintiff (see paras 46–47, 49, 55, 56 & 61).]

Kes-kes yang dirujuk

- Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368; [2008] 1 CLJ 264, MT (dirujuk)
- Bernard v A-G of Jamaica* [2005] 2 LRC 561, MA (dirujuk)
- Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329; [2010] 8 CLJ 656, MR (dirujuk)
- Cashflow Horizon Sdn Bhd v Subramaniam Paidathally & Anor* [2010] 2 CLJ 487, MT (dirujuk)
- Fadiiah Nadwa Fikri & Ors v Konstabel Fauziah Mustafa & Ors and another case* [2014] MLJU 1903; [2015] 10 CLJ 259, MT (dirujuk)
- GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir* [2022] 6 MLJ 369; [2022] 10 CLJ 669, MP (dirujuk)
- Guindarajoo all Vegadason v Satgunasingam all Balasingam* [2010] 4 MLJ 842; [2010] 6 CLJ 954, MT (dirujuk)

- A** *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719, MP (dirujuk)
- Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; [1971] 1 LNS 42 (dirujuk)
- B** *Kamarul Azmi Ngah Supian Suri & Satu Lagi lwn Huslan Che Kussin & yang lain* [2016] 1 LNS 1760, MT (dirujuk)
- Liew Geok Lan v John Loh* [1993] MLJU 301; [1993] 3 CLJ 158, MT (dirujuk)
- Lister and others v Hesley Hall Limited* [2001] UKHL 22, HL (dirujuk)
- C** *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653, MR (dirujuk)
- Thompson v Commissioner of Police of the Metropolis Hsu v Commissioner of Police for the Metropolis* [1997] 2 All ER 762, MR (dirujuk)
- D** *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, MP (dirujuk)
- Rookes v Barnard* [1964] AC 1129, HL (dirujuk)
- Rosharee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39, MT (dirujuk)
- E** *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, MP (dirujuk)
- Saul Hamid bin Pakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman & Anor* [1999] 6 MLJ 800; [1999] 1 LNS 83, MT (dibeza)
- Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79; [1982] 1 LNS 29 (dirujuk)
- F** *Syarizan bin Sudirmin (a child claimed through the father and his attorney Sudirmin bin Selamat) & Ors v Abdul Rahman bin Bukit & Anor* [2010] 8 MLJ 530; [2010] 3 CLJ 877, MT (dirujuk)
- Tan Sri Norian Mai & Ors v Chua Tian Chang & Ors* [2015] 4 MLJ 464; [2015] 6 CLJ 1045, MR (dirujuk)
- G** *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Ong San Huei* [2018] 4 MLJ 673; [2018] 3 CLJ 509, MR (dirujuk)
- Zulkipli bin Taib & Anor v Prabakar all Bala Krishna & Ors and other appeals* [2015] 2 MLJ 607; [2015] 2 CLJ 766, MR (dirujuk)
- H**

Undang-undang yang dirujuk

Akta Dadah Berbahaya 1952 ss 12(2), (3), 39B

Akta Prosiding Kerajaan 1956 ss 5, 6

Kanun Keseksaan ss 211, 466, 471

- I** Kaedah-Kaedah Mahkamah 2012 A 35 k 1, k 1(2)

Perlembagaan Persekutuan

Subramaniyan A Nambiar (Subramaniyan) bagi pihak plaintif.

Muhammad Fauzi bin Md Yusof (Peguam Kanan Persekutuan, Pejabat Penasihat

Undang-Undang Negeri Perak Darul Ridzuan) bagi pihak defendan kedua, ketiga dan keempat.

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Bhupindar Singh PK:

Pengenalan

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[1] Dalam kes ini plaintif telah membawa tindakan terhadap defendan-defendan untuk penyalahgunaan kuasa oleh defendan pertama dan penahanan salah (*false imprisonment*). Plaintif menuntut ganti rugi am bagi tempoh dia ditahan secara salah dan ganti rugi teladan sebanyak RM1 juta daripada defendan-defendan.

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FAKTA KES

[2] Pada 9 November 2016, plaintif telah ditahan oleh anggota Agensi Antidadah Kebangsaan Md Ilyas Syahmi bin Ibnu bersabit Sitiawan Repot 13478/16. Kemudiannya pada hari yang sama, defendan pertama yang merupakan seorang polis berpangkat inspektor dan pegawai penyiasat narkotik Ibu Pejabat Polis Daerah Manjung, Perak telah menangkap semula plaintif serta membuat Sitiawan Repot 13482/16. Kertas siasatan telah dibuka di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB') oleh defendan pertama kerana jumlah dadah heroin yang dijumpai adalah seberat 36.4g.

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[3] Selepas itu, pada 10 November 2016 permohonan reman ke atas plaintif telah dibuat di Mahkamah Majistret Seri Manjung Perak dan majistret telah meluluskan reman selama enam hari mulai 10 November 2016 hingga 15 November 2016. Seterusnya, majistret telah membenarkan reman plaintif disambung dari 16 November 2016 hingga 21 November 2016. Pada 21 November 2016, plaintif telah dituduh di Mahkamah Majistret Seri Manjung di bawah s 39B ADB No Kes MMSM (T) 81–26–11 Tahun 2016 dan plaintif telah ditahan di penjara Tapah, Perak.

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[4] Timbalan pendakwa raya ('TPR'), How May Ling telah pada 23 Februari 2017 membuat suatu laporan polis iaitu Sitiawan Repot 2223/17 yang menzahirkan bahawa minit dalam kertas siasatan bersangkut Sitiawan Repot 13482/16 telah dipalsukan kerana tulisan pada minit tersebut bukanlah tulisan beliau. Tambahan pula kertas siasatan berkenaan tidak pernah didaftar masuk ke Pejabat Pengarah Pendakwaan Negeri Perak pada bila-bila masa sebelum 20 Februari 2017.

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[5] Fakta yang dipersetujui oleh kedua-dua pihak dalam kes ini, adalah bahawa defendan pertama telah memalsukan tandatangan TPR, Puan How May Ling dan telah arahkan begini:

- A** (1) Kertas siasatan (K/S) dilihat.
 (2) Sila tuduh (B1) (Plaintif) di bawah s 39B ADB 1952 atas kesalahan mengedar 36.40 gram Heroin.
 (3) Barang kes dirampas dari dalarn beg yang dipakai oleh (B1) semasa sebutan.
B (4) Pegawai Penyiasat diminta lampirkan rekod kesalahan lampau (B1) dalam K/S.
 (5) Ujian saringan awal air kencing (B1) didapati positif untuk mop.
 (6) Lapor kembali apabila perolehi Lap Kimia dan Lap Patologi.

C Tandatangan
 HOW MAY LING
 Timbalan Pendakwa Raya
 Perak Darul Ridzuan

D [6] Juga tidak dipertikaikan bahawa pada 7 Mac 2017, pertuduhan terhadap plaintif telah dipinda daripada s 39B ADB kepada s 12(2) atau (3) ADB sebanyak tiga pertuduhan setelah arahan diberikan oleh Pejabat Pengarah Pendakwaan Negeri Perak berdasarkan laporan kimia dan patologi yang telah diterima. Plaintif telah mengaku salah dan dijatuhkan hukuman pemenjaraan oleh mahkamah. Setelah menjalani hukuman plaintif telah dilepaskan dari penjara pada 12 Disember 2017.

E [7] Dalam kertas siasatan yang berkenaan, defendan pertama juga telah memalsukan tandatangan dua orang pegawai polis lain iaitu Inspektor Noor Azlan bin Zaidin dan ASP Su That a/l Frat Kong. Keterangan mengenai pemalsuan yang dibuat oleh defendan pertama terdapat dalam laporan kimia yang dipersetujui dan diterima oleh kedua-dua pihak.

G [8] Akibat daripada laporan poiis yang dibuat oleh TPR How May Ling, defendan pertama telah ditahan dan kemudiannya dituduh di bawah s 211, 466 dan 471 atau 466 Kanun Keseksaan. Setelah didapati bersalah defendan pertama telah dijatuhkan hukuman pemenjaraan selama tiga tahun. Di peringkat rayuan, hukuman pemenjaraan defendan pertama telah dikurangkan kepada pemenjaraan selama enam bulan dari tarikh hukuman (23 September 2019). Bagi pertuduhan di bawah s 466/471 Kanun Keseksaan defendan pertama juga telah dikenakan hukuman denda sebanyak RM1,000 jika tidak bayar satu bulan penjara.

H [9] Melalui surat bertarikh 18 Disember 2018, defendan pertama telah dimaklumkan bahawa dia telah digantung kerja mulai 31 Oktober 2018 kerana terdapat sabitan kes jenayah di mahkamah sesyen SPRM Ipoh No Kes AA-61-01-06 Tahun 2017 dan telah dijatuhkan hukuman pemenjaraan selama tiga tahun bagi setiap pertuduhan. Setelah tamat rayuan kes defendan

pertama di Mahkamah Tinggi, dia telah dijatuhkan hukuman 'Buang Kerja' oleh Lembaga Tatatertib Polis Diraja Malaysia berkuat kuasa pada 14 April 2020.

A

TUNTUTAN PLAINTIF

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[10] Semasa penghujahan, peguam yang bijaksana bagi plaintiff telah bersetuju bahawa pihak plaintiff hanya akan menuntut ganti rugi untuk penahanan salah bagi tempoh 106 hari sahaja iaitu dari 21 November 2016 hingga 7 Mac 2017. Tempoh ini bermula dari tarikh plaintiff dituduh di mahkamah di bawah s 39B ADB dan seterusnya ditahan di penjara sehingga plaintiff mengaku salah terhadap pertuduhan pindaan di bawah s 12(2) ADB.

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[11] Plaintiff menegaskan bahawa defendan pertama telah memalsukan minit dan tandatangan Inspektor Noor Azlan bin Zaidin, ASP Su That a/l Frat Kong dan TPR How May Ling. Berdasarkan pemalsuan minit ini defendan pertama telah menuduh plaintiff di bawah s 39B ADB. Natijahnya, plaintiff telah ditahan secara salah dan dinafikan hak kebebasan diri yang diperuntukkan dalam Perlembagaan Persekutuan.

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[12] Sehubungan dengan itu, plaintiff menyatakan bahawa defendan pertama telah menjalankan tugas awamnya secara salah dan menyebabkan kemudaratan serta penyeksaan kepada plaintiff. Plaintiff menekankan bahawa defendan pertama telah melakukan perbuatan ini dalam perjalanan pekerjaannya sebagai seorang pegawai penyiasat dan semasa perkhidmatannya dengan defendan keempat. Pada masa tersebut defendan kedua dan ketiga ialah pegawai atasan defendan pertama, yang turut berkhidmat untuk defendan keempat.

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[13] Menurut plaintiff semasa defendan pertama melakukan pemalsuan tersebut, dia ialah pegawai penyiasat kes plaintiff yang berada di bawah kawalan defendan kedua dan ketiga, dan majikannya ialah defendan keempat. Oleh itu, defendan keempat bertanggungjawab secara vikarius sebagai majikan terhadap perbuatan salah defendan pertama.

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KES DEFENDAN-DEFENDAN

[14] Ingin dinyatakan defendan pertama tidak memfailkan pernyataan pembelaan dan tidak hadir sepanjang perbicaraan kes ini. Peguam kanan persekutuan ('PKP') yang mewakili defendan kedua, ketiga dan keempat ('D2-4') telah menarik diri daripada mewakili defendan pertama kerana konflik kepentingan yang akan memudaratkan defendan pertama disebabkan defendan pertama telah dituduh untuk kesalahan jenayah oleh Jabatan Peguam Negara.

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- A** [15] Mengenai tindakan kecuaiian dan/atau peninggalan yang dilakukan oleh defendan pertama, dalam pernyataan pembelaan D2–4, mereka mengakui dan menyatakan seperti yang berikut:
- B** (a) defendan pertama tidak merujuk kertas siasatan tersebut kepada Pengarah Pendakwaan Negeri Perak untuk suatu arahan lanjut;
- (b) defendan pertama telah memalsukan minit yang mengandungi cop dan tandatangan TPR How May Ling;
- C** (c) minit yang telah dipalsukan yang mengandungi cop dan tandatangan TPR How May Ling telah dimasukkan ke dalam kertas siasatan oleh defendan pertama;
- (d) tindakan defendan pertama pada masa material tidak mempunyai sebarang kaitan dan/atau tidak ada kena mengena dengan tugas rasmi defendan pertama sebagai pegawai narkotik;
- D** (e) tindakan pemalsuan minit pada kertas siasatan dan pemalsuan tandatangan TPR bukanlah dalam skop kerja defendan pertama sebagai seorang pegawai narkotik; dan
- E** (f) tindakan defendan pertama juga adalah bersifat peribadi ‘frolic of her own’ dan di luar kawalan defendan kedua hingga keempat.
- F** [16] Selanjutnya, D2–4 menyatakan bahawa defendan keempat tidak bertanggung sama sekali menurut s 5 dan 6 Akta Prosiding Kerajaan 1956 (‘APK 1956’) terhadap tindakan dan/atau peninggalan defendan pertama yang dilakukan atas kapasiti peribadi defendan pertama (*frolic of her own*). Sekiranya terdapat sebarang tanggungan sekalipun terhadap D2–4, ia patut dipampas atau ditanggung rugi keseluruhannya secara peribadi oleh defendan pertama.
- G** [17] Oleh itu, D2–4 memohon agar tuntutan plaintif ditolak dengan kos.
- ANALISA DAN DAPATAN MAHKAMAH**
- H** *Isu liabiliti — Liabiliti vikarius — Sama ada perbuatan itu dilakukan dalam perjalanan pekerjaan (‘in the course of employment’)*
- [18] Isu yang perlu diputuskan dalam tindakan ini adalah sama ada D2–4 bertanggung secara vikarius terhadap perbuatan salah defendan pertama.
- I** [19] Dalam kes *Lister and others v Hesley Hall Limited* [2001] UKHL 22, mahkamah telah memutuskan:
- [14] Vicarious liability is legal responsibility imposed on an employer, although he is himself free from blame, for a tod committed by his employee in the course of his employment.

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The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability.

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[70] But the precise terminology is not critical. The Salmond test, in either formulation, is not a statutory definition of the circumstances which give rise to liability, but a guide to the principled application of the law to diverse factual situations. *What is critical is that attention should be directed to the closeness of the connection between the employee's duties and his wrongdoing* and not to verbal formulae. This is the principle on which the Supreme Court of Canada recently decided the important cases of *Bazley v Curry* 174 DLR(4th) 45 and *Jacobi v Griffiths* 174 DLR(4th) 71 which provide many helpful insights into this branch of the law and from which I have derived much assistance.

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[79] So it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty.

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[84] I would hold the school vicariously liable for the warden's intentional assaults, not (as was suggested in argument) for his failure to perform his duty to take care of the boys. That is an artificial approach based on a misreading of *Morris v Martin*. The cleaners were vicariously liable for their employee's conversion of the fur, not for his negligence in failing to look after it. Similarly in *Photo Production v Securicor Transport Ltd* the security firm was vicariously liable for the patrolman's arson, not for his negligence. The law is mature enough to hold an employer vicariously liable for deliberate, criminal wrongdoing on the part of an employee without indulging in sophistry of this kind. (Penekanan ditambah.)

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[20] Kes *Lister* telah dirujuk dalam kes *Bernard v A-G of Jamaica* [2005] 2 LRC 561 yang juga menerangkan pendekatan yang patut digunakan dalam menentukan liabiliti vikarius:

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Lister is, however, important for a number of reasons. It emphasised clearly the intense focus required on the closeness of the connection between the tort and the individual tortfeasor's employment. It stressed the need to avoid terminological issues and to adopt a broad approach to the context of the tortious conduct and the employment.

I

...

The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort and to ask whether

- A looking at the matter in the round it is just and reasonable to hold the employers vicariously liable. In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee.
- B [21] Mahkamah Rayuan dalam kes *Zulkipli bin Taib & Anor v Prabakar all Bala Krishna & Ors and other appeals* [2015] 2 MLJ 607; [2015] 2 CLJ 766 dalam penghakimannya telah menggunakan pendekatan yang putuskan dalam kes *Lister* dan menyatakan:
- C [67] The above discussion may be summarised by stating that the common law requirement, which states that ‘an employee should act within the scope of his employment’ to find his employer vicariously liable, has initially been interpreted by the courts in terms of the *Salmond* rule. An employee, according to the rule, was not acting within the scope of employments, if these wrongful actions or conduct was against the employer’s instruction or interest. The cases discussed above developed the standard test to include deviated actions of employees. These cases, especially
- D the case of *F v Minister of Safety and Security*, formally introduced the close connection test into the common law principle of vicarious liability.
- E [68] We respectfully agree with the decisions of the above cases. In our opinion, if a close connection between the deviated actions of an employee and the purpose or nature of his employment is established by certain factual evidence, an employee may be found to be acting within the scope of his employment.
- ...
- F We were satisfied that unlawful acts of the defendants were very closely connected with the acts that they were authorised to do so. In other words, the acts were not so divorced from their works.
- ...
- G [70] We agreed with the submissions of learned counsel for the plaintiff that the impugned acts of the defendants were closely connected with the acts that they were authorised to do ie, ‘soal siasat’.
- H [22] Daripada nas di atas adalah jelas dalam menentukan liabiliti vikarius, mahkamah memakai ujian yang menyatakan bahawa seseorang pekerja akan dianggap telah bertindak dalam perjalanan pekerjaannya apabila dia melakukan tort jika tort itu sangat berkait rapat dengan pekerjaannya sehingga adalah adil dan saksama bagi majikan bertanggung secara vikarius untuk tort itu. Mahkamah Persekutuan dalam kes *GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir* [2022] 6 MLJ 369; [2022] 10 CLJ 669 mengesahkan tentang pemakaian ujian kaitan rapat apabila memutuskan:
- I [30] Be that as it may, the Australian High Court in *Prince Alfred College Incorporated v ADC* [2016] HCA 37 expressed some misgivings about the approach taken by the UK Supreme Court in *Mohamud*. Even so, we do not think it is necessary to delve in detail the differences in the two cases. In the end, both those decisions approved of the close connection test in *Lister v Hesley Hall Ltd* and it was

- only the way in which the test is to be applied that was the subject of contention. With respect, the outcome of the application of the close connection test, in any event, would depend very much on the facts and circumstances of each case. A
- [31] In our considered opinion, and after considering the prevailing law we have set out in the foregoing discussion, the scope of vicarious liability in a case where the employee committed an intentional wrong is underpinned by the following common denominators: B
- (a) the intentional wrong must be committed by the employee in the course of employment;
 - (b) there must be connection between the wrongful act and the nature of the employment; C
 - (c) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and
 - (d) *the risk is created by the employer, owing to the features of the business.* D
- [32] Applying these factors to the instant case, we do not see how the High Court and the majority in the Court of Appeal had erred in applying the close connection test.
- ...
- [40] The 'close connection' test as we have earlier explained in the current appeal has been well accepted by this court in *Dr Kok Choong Seng & Anor v Soo Cheng Lin & another appeal* [2018] 3 MLJ 685; [2017] 10 CLJ 529 and later in *Dr Hari Krishnan & Anor v Megat Noor Ishak Megat Ibrahim & Anor and another appeal* [2018] 1 MLJ 281; [2018] 3 CLJ 427. Similarly, the Court of Appeal too had applied this test in *Zulkipli bin Taib & Anor v Prabakar all Bala Krishna & Ors and other appeals* [2015] 2 MLJ 607; [2015] 2 CLJ 766, *Datuk Seri Khalid Abu Bakar & Ors v N Indra P Nallathamby & another appeal* [2015] 1 MLJ 353; [2014] 9 CLJ 15 and *Maslinda Ishak v Mohd Tahir Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653. In adopting this test, the Federal Court adopted the English decision of *Various Claimants v Catholic Child Welfare Society And Others* [2013] 2 AC 1, which followed a landmark case of the House of Lords in *Lister And Others v Hesley Hall Ltd* [2001] UKHL 22 where the test was originally introduced. F
- ...
- It is therefore important to note that the 'close connection' test must always be considered on the factual matrix and circumstances of each case and cannot apply independently without looking at each set of facts. G
- [23] Berbalik kepada kes di hadapan mahkamah, defendan keempat hanya akan bertanggung secara vikarius sebagai majikan atau prinsipal tertakluk kepada peruntukan ss 5 dan 6 APK 1956. Seksyen 5 dan 6 tersebut dikemukakan seperti yang berikut: H
- 5 Liability of the Government in tort I

- A** Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.
- B**

6 Limits of liability of the Government

- C** (1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.
- D** (2) Any written law which negatives or limits the amount of the liability of any public officer in respect of any act, neglect or default committed by that officer shall, in the case of proceedings against the Government under section 5 in respect of such act, neglect or default of such officer, apply in relation to the Government as it would have applied in relation to such officer if the proceedings against the Government had been proceedings against such officer.
- E** (3) No proceedings shall lie against the Government by virtue of section 5 in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.
- F** (4) No proceedings shall lie against the Government by virtue of s 5 in respect of any act, neglect or default of any public officer, unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government wholly out of the revenues of the Government, or any fund certified by the appropriate financial officer for the purposes of this subsection or was at the material time holding an office in respect of which the appropriate financial officer certifies that the holder thereof would normally be so paid.
- G**
- H** (5) For the purposes of subsection (4) the expression 'appropriate financial officer' means, in respect of the Federal Government, the Minister of Finance, and in respect of the Government of a State, the State Financial Officer, and, in the case of the States of Sabah and Sarawak, the State Minister responsible for finance.

- I** [24] Perlu ditekankan bahawa perbuatan defendan pertama melakukan pemalsuan minit TPR How May Ling dan dua orang pegawai polis lain tidak dipertikaikan oleh defendan-defendan. Plaintiff menghujahkan berdasarkan s 5 APK 1956, defendan keempat hendaklah bertanggungjawab terhadap perbuatan salah defendan pertama manakala D2-4 bertegas yang peruntukan s 5 dan 6

APK 1956 tidak terpakai kerana tindakan defendan pertama dilakukan atas kapasiti peribadi.

A

[25] Walaupun tidak terdapat keterangan yang menunjukkan D2–4 memberi kuasa kepada defendan pertama untuk melakukan pemalsuan tersebut, tetapi persoalan yang kritikal adalah adakah perbuatan defendan pertama yang menyalahi undang-undang sangat berkait rapat dengan perjalanan pekerjaannya sehingga ia boleh dirumuskan bahawa adalah adil dan saksama bagi D2–4 bertanggung secara vikarius terhadap perbuatan defendan pertama.

B

C

[26] Bagi menjawab persoalan di atas, rujukan harus dibuat kepada keterangan plaintif dan defendan-defendan dalam kes ini. Keterangan ASP David ak Mybonie (SD1) mendedahkan maklumat yang berikut:

D

P: Setuju ASP sebenarnya defendan pertama memalsukan 3 tandatangan pegawai iaitu Insp Nor Azlan, ASP Su That dan Timbalan Pendakwa Raya DPP?

SD1: Ya YA.

P: Dan semasa defendan pedama membuat pemalsuan ketiga-tiga pegawai ini, beliau adalah pegawai penyiasat kes terhadap plaintif?

E

SD1: Ya YA.

P: ... Juga pada masa itu, beliau juga adalah pegawai polis yang ditauliahkan untuk menjalankan tugas sebagai pihak polis?

F

SD1: Ya YA.

P: Juga pada masa itu, defendan pedama adalah di bawah kawalan defendan 2 dan 3 dan adalah pekerja defendan 4?

SD1: Ya YA.

G

SFC: ASP ada ditanyakan tadi bahawa semasa defendan membuat siasatan ini dan membuat perkara-perkara pemalsuan ini, dia di bawah kawalan D2, D3 dan D4 dan ASP jawab ya semasa disoal balas oleh peguam Plaintif. Boleh ASP terangkan kawalan yang bagaimana ASP?

SD1: Kerana semasa D1 melakukan perkara ini, dia adalah di bawah kuasa D2, D3 dan D4 sebagai majikan ataupun penyelia yang membayar gaji atau bedanggunjawab ke atas pegawai tersebut YA.

H

[27] Dalam Ikatan B iaitu dokumen yang dikelaskan dalam Bahagian A, dokumen bilangan 1 'skop tugas pegawai penyiasat bahagian narkotik' di ms 4 tercatat:

I

Pegawai penyiasat akan membuat minit kedas siasatan kepada KBSJN Daerah dengan cadangan-cadangannya sekali. Seandainya OKT dicadangkan untuk

A dituduh ataupun tidak di mahkamah, pegawai penyiasat akan menyatakan alasan-alasan berhubung dengan cadangannya.

B [28] Fakta yang tidak dapat dinafikan ialah defendan pertama merupakan seorang anggota polis yang berpangkat Inspektor. Defendan pertama juga ialah pegawai penyiasat yang ditugaskan untuk menyiasat kes plaintif. Tugas dan tanggungjawab defendan pertama sebagai pegawai penyiasat menghendakinya untuk mencatatkan minit dalam kertas siasatan bagi apa-apa siasatan yang dilakukan. Amat ketara bahawa tindakan untuk membuat catatan minit dalam kertas siasatan adalah sangat berkait rapat dengan perjalanan pekerjaan defendan pertama.

D [29] Menurut keterangan SD1, defendan pertama telah memalsukan minit dan tandatangan tiga orang pegawai kerana tempoh reman akan tamat pada 21 November 2016, minit dalam kertas siasatan masih belum disiapkan oleh defendan pertama dan defendan pertama akan mula bercuti dari 17 November 2016 hingga 30 November 2016. Selanjutnya SD1 menjelaskan bahawa:

- (a) jika reman tamat ia tidak boleh dilanjutkan;
- E (b) reman untuk 39B dalam kes ini akan tamat 21 November 2016. Sepatutnya kertas siasatan hendaklah dirujuk kepada TPR sama ada untuk OKT dituduh di mahkamah ataupun dibebaskan; dan
- (c) defendan pertama tahu reman akan tamat tetapi tidak merujuk kepada TPR.

F [30] Defendan pertama juga telah mengesahkan informasi yang tidak benar dalam permohonan cutinya apabila dia menyatakan:

G Saya mengesahkan bahawa saya tidak mempunyai kerja-kerja segera yang tertangguh dan tugas-tugas yang sedia ada telah ditaklimatkan kepada pegawai atasan dan pegawai pengganti ...

H Kerja untuk memastikan minit dalam kertas siasatan disediakan dalam tempoh yang ditentukan dan kertas siasatan dirujuk kepada TPR ialah tugas rasmi defendan pertama, tetapi dia telah memalsukan minit TPR kerana ingin bercuti. Tindakan pemalsuan dibuat oleh defendan pertama dilakukan semasa melaksanakan skop tugasnya.

I [31] Dalam kes ini walaupun terdapat pemalsuan minit oleh defendan pertama, pemalsuan minit ini dalam kertas siasatan tersebut adalah sangat berkait rapat dengan perjalanan pekerjaan defendan pertama. Alasan pemalsuan yang dikemukakan oleh SD1 jelas menunjukkan bahawa pemalsuan ini sememangnya dilakukan dalam perjalanan pekerjaan defendan pertama sebagai seorang pegawai penyiasat. Oleh itu, mahkamah tidak dapat

menerima alasan PKP yang perbuatan pemalsuan ini merupakan ‘frolic of her own’, kerana jelas perbuatan defendan pertama sangat berkait rapat dengan perjalanan pekerjaannya.

A

[32] Dalam kes *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653 Suriyadi Halim Omar HMR semasa menulis tentang liabiliti vikarius telah menerangkan:

B

[15] Perusing the submissions of the parties, it was no surprise to see that both parties had supplied some near similar cases and, on that excuse we refer to some of them. In *Dyre and Wife v Munday & Anor* [1895] 2 QB 742 (CA) Lord Esher MR ruled:

C

The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master’s business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.

D

[17] In *Goh Choon Seng v Lee Kim Soo* [1925] AC 550, a pad from holding the same view as above, held that where a servant did some work for which he was appointed to do, but did in a manner not authorized, and would not have authorised had he known it, the master was nevertheless liable.

E

...

As he took the unauthorised photographs, whilst in the course of the work or employment, for which he was instructed to carry out, at a time when the operation was in progress, the respondents must be held vicariously liable. In a nutshell, the evidence of snapping the photographs being so closely connected to his duties not only was overwhelming, but fitted well with the remarks of Lord Kilbrandon of *Keppel Bus Co Ltd v Sa’ad bin Ahmad*.

F

[33] Tindakan defendan pertama melakukan perbuatan yang menyalahi undang-undang, iaitu pemalsuan minit dalam kertas siasatan sangat berkait rapat dengan perjalanan pekerjaannya. Semasa menjalankan pekerjaannya defendan pertama telah melakukan pemalsuan minit, ia merupakan perbuatan yang sangat berkait rapat dengan tugas dan kewajipan defendan pertama sebagai seorang pegawai penyiasat dan anggota polis. Oleh itu, berdasarkan alasan yang dinyatakan di atas, D2–4 yang merupakan majikan dan prinsipal defendan pertama hendaklah bertanggungjawab secara vikarius atas perbuatan defendan pertama. Maka, mahkamah membenarkan tuntutan plaintif terhadap D2–4.

G

H

Kegagalan defendan pertama hadir di mahkamah

I

[34] Sebagaimana yang dinyatakan sebelum ini, defendan pertama tidak memfailkan pernyataan pembelaan dan tidak hadir semasa perbicaraan kes. Defendan pertama juga tidak melantik peguam untuk membela dirinya dalam

A tindakan ini setelah PKP menarik diri daripada mewakili defendan pertama. Kes ini telah ditetapkan untuk perbicaraan pada 25 November 2021 hingga 26 November 2021, pada tarikh perbicaraan peguam yang bijaksana bagi plaintif telah memberitahu mahkamah bahawa defendan pertama telah dimaklumkan tentang tarikh perbicaraan melalui surat berdaftar bertarikh 10 November 2021.

[35] Aturan 35 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') memperuntukkan mengenai kegagalan mana-mana pihak untuk hadir pada tarikh perbicaraan:

- C 1 Kegagalan untuk hadir oleh kedua-dua pihak atau salah satu pihak (A 35 k 1)
- D (1) Sekiranya, apabila suatu tindakan dipanggil untuk perbicaraan, tiada satu pihak pun hadir, Hakim boleh menolak tindakan itu atau membuat perintah lain yang difikirkannya patut.
- E (2) Sekiranya, apabila suatu tindakan dipanggil untuk perbicaraan, satu pihak tidak hadir, Hakim boleh meneruskan dengan perbicaraan tindakan itu atau apa-apa tuntutan balas semasa ketiadaan pihak itu, atau tanpa perbicaraan memberikan penghakiman atau menolak tindakan itu, atau membuat perintah lain yang difikirkannya patut.

[36] Setelah berpuas hati bahawa defendan pertama telah dimaklumkan mengenai tarikh perbicaraan dan peguam yang bijaksana bagi plaintif tidak memohon penghakiman terhadap defendan pertama, saya telah meneruskan dengan perbicaraan kes ini berdasarkan A 35 k 1(2) KKM 2012.

[37] Dalam kes *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79; [1982] 1 LNS 29, Ajaib Singh H (pada ketika itu) telah menyatakan 'The plaintiff or the defendant who stays away when an action is called on for hearing does so at his peril'. Mahkamah dalam kes *Liew Geok Lan v John Loh* [1993] MLJU 301; [1993] 3 CLJ 158 telah memutuskan:

H Having satisfied myself that the defendant has been duly informed of the hearing of this case and he not appearing without any explanation I proceeded to hear the plaintiff's case pursuant to O 35 r 1 of the Rules of High Court 1980.

I In considering this particular case in view of the absence of the defendant I bear in mind the following principles of law, namely, that the plaintiff is required to prove her claim so far as the burden of proof lies on her. The proof will be limited to the allegations in the claim, in this case as contained in the originating summons and the supporting affidavits (see: *Barker v Furlong* [1891] 2 Ch 172 at p 179).

Further, the plaintiff having proved her case is entitled to such relief as she claims and such other relief as is consistent therewith (see: *Stone v Smith* [1887] 35 Ch D 188 and *Kingdom v Kirk* [1888] 37 Ch D 141).

[38] Berkaitan dengan isu kegagalan defendan untuk hadir pada tarikh perbicaraan, dalam *Guindarajoo all Vegadason v Satgunasingam all Balasingam* [2010] 4 MLJ 842; [2010] 6 CLJ 954 mahkamah telah menerangkan:

[6] So what is the position that obtains when the defendant does not turn up at the trial? There are two aspects to this. The first consequence is, as I have said elsewhere (*Anne Lim Keng See (trading as Golden Kintex-Sole-proprietorship) v Malayan Banking Bhd* [2009] 9 MLJ 502; [2009] 10 CLJ 34 ; [2009] 1 LNS 588), that if one party appears and the court is ready to hear the matter on its merits, then the testimony of all the witnesses present must be heard before a decision is pronounced (see also *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79; ; [1982] CLJ 261; [1982] CLJ Rep 747). The second aspect is that unless the evidence is inherently implausible, the court will have to accept such evidence presented as true since no evidence to the contrary has been adduced (*Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381; [2009] 1 LNS 1059; *Wasakah Singh v Bachan Singh* [1931] 1 MC 125).

[39] Berdasarkan keterangan di hadapan mahkamah, adalah jelas bahawa defendan pertama telah melakukan pemalsuan minit dalam kertas siasatan bersabit kes jenayah plaintif. Terdapat penyalahgunaan kuasa oleh defendan pertama sebagai seorang pegawai penyiasat kes dalam perjalanan pekerjaannya. Akibat perbuatan salah defendan pertama, plaintif telah dituduh di bawah s 39B ADB dan ditahan di penjara sehingga pindaan pertuduhan dibuat oleh pihak pendakwaan. Oleh yang demikian, plaintif telah ditahan secara salah dari 21 November 2016 hingga 7 Mac 2017.

[40] Setelah meneliti dan menilai keterangan saksi-saksi dan segala dokumen yang dikemukakan dalam kes ini, mahkamah mendapati bahawa plaintif telah berjaya membuktikan kesnya atas imbangan kebarangkalian terhadap defendan pertama. Oleh itu, tuntutan plaintif terhadap defendan pertama dibenarkan.

Isu mengenai kuantum

[41] Peguam yang bijaksana bagi plaintif dalam penghujahannya memohon agar Mahkamah ini membenarkan tuntutan ganti rugi dan kos seperti yang berikut:

- (a) ganti rugi am untuk penahanan salah, penyalahgunaan kuasa oleh defendan pertama dan penyalahgunaan proses mahkamah selama 106 hari x RM30,000 sehari, sebanyak RM3.18 juta;
- (b) ganti rugi teladan sebanyak RM1 juta;
- (c) ganti rugi teruk sebanyak RM500,000;

- A (d) faedah pada kadar 5% setahun dari tarikh penghakiman sehingga penjelasan penuh;
- (e) kos tindakan ini sebanyak RM200,000; dan
- B (f) lain-lain perintah yang mahkamah yang mulia anggap patut dan sesuai.
- [42] Bagi menyokong tuntutan ganti rugi yang dikemukakan oleh plaintiff, nas-nas berikut telah dirujuk:
- C (a) *Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368; [2008] 1 CLJ 264;
- (b) *Fadiah Nadwa Fikri & Ors v Konstabel Fauziah Mustafa & Ors and another case* [2014] MLJU 1903; [2015] 10 CLJ 259
- D (c) *Kamarul Azmi Ngah Supian Suri & Satu Lagi lwn Huslan Che Kussin & yang lain* [2016] 1 LNS 1760;
- (d) *Cashflow Horizon Sdn Bhd v Subramaniam Paidathally & Anor* [2010] 2 CLJ 487;
- E (e) *Syarizan bin Sudirmin (a child claimed through the father and his attorney Sudirmin bin Selamat) & Ors v Abdul Rahman bin Bukit & Anor* [2010] 8 MLJ 530; [2010] 3 CLJ 877; dan
- (f) *Roshairree bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39.
- F [43] Mahkamah Rayuan dalam kes *Tan Sri Norian Mai & Ors v Chua Tian Chang & Ors* [2015] 4 MLJ 464; [2015] 6 CLJ 1045 telah merujuk kepada buku *McGregor on Damages* dan menjelaskan mengenai taksiran ganti rugi bagi penahanan salah, seperti yang berikut:
- G [58] In *McGregor on Damages*, it was observed by the learned commentator that:
- H The details on *how damages are worked out in false imprisonment are few: generally it is not pecuniary loss but a loss of dignity and the like and is left much to the jury's and judge's discretion. The principal heads of claim would appear to be the injury to liberty*, ie, the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings, ie, the indignity, mental suffering, disgrace and humiliation with any attendant loss of social status and injury to reputation ... In addition there may be recovery for any resultant physical injury, illness or discomfort ... further any pecuniary loss which is not too remote is recoverable;
- I there appears to be no modern reported cases ... that any loss of general business or employment is recoverable would seem to follow from *Childs v Lewis* ...
- [61] Case-law in respect of damages for false imprisonment, was reviewed in *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrui Zaman PS Md Zakariah*. The award of RM3,000,000 pegged at the rate of RM20,000 per

- day and discounted at 50% was reduced to an award of RM300,000, effectively amounting to RM1,000 per day. A
- [62] This court in *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrui Zaman PS Md Zakariah* has stated that the total amount for longer periods is not a case of simple arithmetical progression, but that damages awarded must be 'sufficient' since it will be in the public interest to award more than nominal damages 'in order to give reality to the protection afforded by law to personal freedom'. This is because the fact remains that the false imprisonment remains one and the same. False imprisonment is not a separate wrong each determined upon a daily, weekly or monthly basis. Nor is it upon an hourly or minute by minute basis. Nevertheless it is unarguable that although the severity of false imprisonment is not necessarily upon an arithmetical progression, the longer the false imprisonment the more severe is the tort, in our view, the circumstances is always relevant including the reasons given for the arrest and detention, whether efforts made to seek release was actively resisted, if a person did not seek release, but was happy to remain in detention albeit unlawfully, he cannot be said to have suffered much loss of dignity and he should not use the occasion for lucrative income by claiming damages. Ultimately the damages is for what is pleaded, the evidence adduced in respect thereof, and only for damages that is reasonably foreseeable and reasonable. (Penekanan ditambah.) B C D
- [44] Dalam *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Ong San Huei* [2018] 4 MLJ 673; [2018] 3 CLJ 509, Mahkamah Rayuan semasa memutuskan rayuan tentang kuantum penahanan salah menyatakan: E
- [12] As to quantum, learned counsel for the plaintiff argued that the learned judge had correctly applied the 'progressively reducing scale' test. Learned counsel argued that the plaintiff worked as an offshore oil driller and has suffered tremendously during the long period of wrongful detention. The amount of RM300,000 awarded by the learned judge for wrongful detention of 355 days is not excessive and is reasonable. F
- ...
- There is nothing to show that the award of RM300,000 is manifestly high or that the award was a wholly erroneous estimate of the damages or wrong in law. G
- [24] For the foregoing reasons, we find no merits in the issues raised by the defendants in the appeal. We therefore dismissed the appeal with costs. (Penekanan ditambah.)
- [45] Mahkamah telah meneliti dan mempertimbangkan nas-nas yang dikemukakan oleh pihak plaintif. Berkaitan dengan kes *Abd Malek Hussin* yang telah membenarkan ganti rugi sebanyak RM1 juta bagi penahanan salah, ingin dinyatakan bahawa Mahkamah Rayuan telah mengakaskan keputusan ini (lihat: *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329; [2010] 8 CLJ 656). Cara kiraan yang digunakan oleh plaintif iaitu RM30,000 sehari adalah berdasarkan petikan berikut dalam kes *Abd Malek Hussin*: H I

General Damages For Wrongful Arrest And Detention For 57 Days

- A [52] Encik Sivarasa, the learned counsel for the plaintiff, after referring to several case authorities, submits that the *appropriate amount for an unlawful detention of 24 hours in Malaysia would be in the region of RM25,000 to RM30,000. He concedes that an award for a period of 57 days should not be a simple arithmetic calculation but would also have to be adjusted.* The learned counsel submits that a simple mathematical approach gives 57 multiplies by (say) RM25,000 which amounts to RM1,425,000.
- B He, however, submits that *an appropriate amount would be about half of that sum, that is to say, RM700,000. In my judgment this is a reasonable proposition.*
- C [53] Encik Sivarasa further submits that there are *a number of significant aggravating factors* in the treatment of the plaintiff during the detention as detailed above in this judgment. The aggravating factors are the breach of the plaintiff's constitutional and fundamental rights, including *right of access to counsel*; the *denial of access* to family members within a reasonable time and frequency of the visits; the *length of the period of solitary detention*; the *interrogation for 19 days* on matters not related to internal security; the *repeated assault* of being *handcuffed and blindfolded* each time the plaintiff was moved from his cell, which is a *distressing experience*; and the *injury to the plaintiff's reputation* as a consequence of the arrest and detention. The learned counsel submits that the total amount of general damages for false imprisonment taking into account such aggravating factors should be increased to RM1,500,000. I am in agreement that there are aggravating factors and that the amount of RM700,000 should be increased taking into account these aggravating factors. But
- D I think increasing the amount of RM700,000 to RM1,500,000 is rather too excessive. In my judgment, taking into account the aggravating factors, the award for false imprisonment should be increased from RM700,000 to RM1m. (Penekanan ditambah.)
- E
- F [46] Dalam kes ini plaintif mengalami kemudaran kerana hak asasinya dicabul oleh defendan pertama dengan pemalsuan catatan dalam kertas siasatan yang mengakibatkan kebebasan diri plaintif tergugat. Pada hemat saya, jumlah ganti rugi am bagi penahanan salah plaintif mestilah adil, memadai dan munasabah. Ganti rugi yang diberikan hendaklah merupakan pampasan yang
- G sewajarnya bagi kehilangan kebebasan plaintif bagi tempoh dia ditahan secara salah dan bukannya jumlah yang berlebih-lebihan atau melampau sebagai hadiah atau kekayaan kepada plaintif.
- H [47] Pada pendapat saya, jumlah RM3.18 juta bagi penahanan salah yang dituntut oleh plaintif adalah sangat tinggi dan melampau. Dalam pernyataan tuntutan plaintif telah menyatakan bahawa defendan pertama telah menjalankan tugas awamnya secara salah dan dengan niat jahat dan untuk menyeksa dan mendera plaintif. Plaintif tidak mengemukakan sebarang keterangan dalam kes ini mengenai apa-apa penyeksaan dan penderaan yang
- I dialaminya semasa dia ditahan. Bahkan keterangan plaintif hanya menunjukkan bahawa dia telah ditahan secara salah sahaja dan tanpa apa-apa aduan atau episod buruk yang lain.
- [48] Dalam kes *Saul Hamid bin Pakir Mohamad v Inspector Abdul Fatah bin*

Abdul Rahman & Anor [1999] 6 MLJ 800; [1999] 1 LNS 83, mahkamah telah memutuskan:

A

In this case the plaintiff in his statement of claim alleged to having suffered 'mental distress, humiliation, and injury' and 'loss of promotion opportunities' arising from the criminal charges preferred but has not given any particulars neither was any evidence led nor any document produced in support of his claim as to damages ...

B

I hold that the failure on the part of the Plaintiff to lead evidence or produce documents to determine quantum allegedly due to him is fatal to the Plaintiffs case. At the end of trial as there was no evidence to support the Plaintiffs claim as to damages I hold that the Plaintiff has therefore not discharged the onus on him and accordingly not entitled to any.

C

[49] Fakta kes ini berbeza sekali dengan nas-nas yang dikemukakan oleh plaintiff kerana dalam kes ini tiada keterangan mengenai digniti, reputasi, kecederaan kepada perasaan, penderitaan mental, perkara yang memalukan atau mengaibkan, atau perbuatan yang menekan, menghina atau menindas plaintiff secara fizikal dibentangkan semasa perbicaraan. Bersandarkan keterangan dan hal keadaan kes ini, saya mendapati ganti rugi am yang adil dan munasabah bagi penahan salah (merangkumi perenggan 34 (a) hingga (c) pernyataan tuntutan) ialah RM2,000 sehari, selama 106 hari menjadikan jumlah ganti rugi am sebanyak RM212,000.

D

E

[50] Beralih kepada ganti rugi teladan, Zawawi Salleh HMR (pada ketika itu) dalam *Zulkipli Taib* telah merujuk kepada kes *Rookes v Barnard* [1964] AC 1129 yang menjelaskan tentang kategori ganti rugi teladan seperti yang berikut:

F

It would be recalled that in that case Lord Devlin specified the following three categories of cases where they could be awarded:

- (a) where there is 'oppressive, arbitrary or unconstitutional action by the servants of the government';
- (b) where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and
- (c) where they are expressly authorised by statute.

G

H

[75] An important point to note is that the three categories of conduct above are to be read disjunctively. The House of Lords in *Broome v Cassell* [1972] AC 1027, said that 'servant of the government should be widely construed' to include anyone exercising governmental power'.

I

[51] Seterusnya dalam kes *Zulkipli Taib* mahkamah telah memutuskan walaupun defendan telah dijatuhkan hukuman penjara, plaintiff masih boleh menuntut ganti rugi teladan dan menggariskan faktor yang perlu diambil kira

A dalam menentukan ganti rugi teladan:

HOW TO CALCULATE AWARDS OF EXEMPLARY DAMAGES

B [86] Among the matters that the court might properly consider in deciding on the quantum of an award of exemplary damages are discussed in *McGregor on Damages* (16th Ed, 1997), at p 306 etseq. They include the followings: (i) such awards are to be moderate; (ii) the conduct of the parties may properly be taken into account; (iii) the quantum of a compensatory award may influence the quantum of an exemplary award; and (iv) the relevance of any criminal penalty (on the basis that 'punishing twice for the same misconduct offends against the basic principles of justice ... p 310, para 467).

C [87] In the case of *NSW v Deity* [2007] NSWCA 303, Tobias J A set out the general principles as to exemplary damages (at paras.[85]–[88]). The touchstones are:

- D (a) The considerations are quite different from compensatory damages and there need be no necessary proportionality between the assessments;
- (b) It is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again;
- E (c) The social purpose is to teach a wrongdoer that 'töd does not pay';
- (d) It is to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self- help likely to endanger the peace;
- (e) It marks the coud's condemnation of the defendant's behaviour; and,
- F (f) It is an exceptional remedy which was rarely awarded and then only where there is high-handed, insolent, vindictive or malicious conduct.

G (See also *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675; [2005] 4 CLJ 871 and *Nurasmira Maulat bt Abd Jaffar & Ors v Ketua Polis Negara & Ors* [2015] 3 MLJ 105; [2015] 2 CLJ 231 (Civil Appeal No W-01–339–10 of 2013).

H [52] Mahkamah dalam kes *Thompson v Commissioner of Police of the Metropolis Hsu v Commissioner of Police for the Metropolis* [1997] 2 All ER 762 telah memutuskan:

I Finally the jury should be told in a case where exemplary damages are claimed and the judge considers that there is evidence to support such a claim, that though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages.

[53] Keterangan SD1 semasa pemeriksaan balas mendedahkan bahawa:

P: Ini soalan saya berasaskan siasatan ASP, adakah pemalsuan tandatangan pegawai polis dan DPP dalam kes ini satu perkara yang ini saja atau pernah berlaku?

- SD1: Pernah berlaku YA. A
- P: Oleh pegawai yang sama?
- SD1: Pengalaman saya ya YA.
- P: Berapa kes macam itu? B
- SD1: Siasatan saya setakat ini ada 3 kes YA. 1 untuk pegawai yang sama, 1 untuk pegawai lain.
- P: 1 untuk yang ini? So ada dua lain?
- SD1: 1 lain. C
- P: 1 atau 2?
- SD1: 2 orang lain. IO lain.
- P: Oh IO lain. So ada 2 IO buat macam ini? D
- SD1: Ya YA.
- P: Berapa orang mangsa selain daripada Plaintiff ini?
- SD1: 2 orang mangsa.
- P: Selain daripada Ikmal? E
- SD1: Ya.
- P: Adakah mangsa-mangsa ini Malaysia atau dari luar negara.
- SD1: Luar negara YA. F
- P: Dan modus operandinya sama ? Memalsukan tandatangan pegawai, DPP dan tuduh mangsa-mangsa ini di bawah Sek. 39B?
- SD1: Ya YA.
- P: Adakah tindakan tatatedib diambil oleh pihak polis terhadap IO lain yang membuat tindakan sama? G
- SD1: Ya YA.
- [54] Setelah mengkaji dan menghayati segala keterangan dalam kes ini, sememangnya jelas tindakan pemalsuan minit kertas siasatan oleh defendan pertama sebagai seorang polis merupakan tindakan yang tidak berperlembagaan. Sepatutnya sebagai seorang polis, defendan pertama hendaklah menegakkan undang-undang dan menjalankan tugas mengikut lunas undang-undang. Terbukti dalam kes ini, tindakan pemalsuan tandatangan dan minit TPR untuk menuduh seseorang di bawah s 39B ADB telah dilakukan beberapa orang pegawai penyiasat narkotik, termasuk defendan pertama. H
I

- A [55] Tindakan pemalsuan minit dalam kertas siasatan oleh defendan pertama yang telah dilakukan dengan sewenang-wenangnya untuk menuduh plaintif di bawah s 39B ADB tidak boleh dipandang ringan oleh mahkamah. Tambahan pula dengan memberi arahan yang dipalsukan ini, plaintif telah
- B ditahan secara salah. Berdasarkan panduan yang diterangkan dalam nas di atas, saya berpendapat hal keadaan kes ini mewajarkan plaintif diberikan ganti rugi teladan.
- C [56] Pada penelitian saya, jumlah ganti rugi teladan sebanyak RM1 juta yang dituntut oleh plaintif merupakan jumlah yang terlalu tinggi. Perlu ditekankan bahawa plaintif tidak mengemukakan sebarang keterangan lain bagi menyokong jumlah ganti rugi teladan yang dituntut. Setelah mengambil kira keseluruhan keterangan, saya berpendapat bahawa jumlah ganti rugi teladan yang munasabah ialah RM30,000. Fakta bahawa defendan pertama telah
- D menjalani hukuman pemenjaraan selama enam bulan bagi kesalahannya telah juga dipertimbangkan.
- E [57] Mengenai ganti rugi teruk, plaintif telah berhujah berdasarkan fakta unik kes ini ganti rugi teruk sebanyak RM500,000 perlu diberikan oleh mahkamah. Harus dijelaskan bahawa pernyataan tuntutan plaintif tidak menampilkan tuntutan mengenai ganti rugi teruk. Prinsip undang-undang yang mantap ialah pihak-pihak terikat dengan pliding masing-masing. Hakim Sharma dalam kes *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; [1971] 1 LNS 42 telah memutuskan:
- F A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be
- G said to be in accordance with the law and the rules of procedure. It is the duty of the Courts to follow the rules of procedure and practice to ensure that justice is done.
- H (lihat: *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719 dan *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147).
- I [58] Oleh itu, memandangkan cabang ganti rugi ini tidak dituntut oleh plaintif, maka atas alasan ini sahaja tuntutan tersebut boleh ditolak. Walau bagaimanapun saya akan mengupas tentang tuntutan ganti rugi teruk yang dipohon. Dalam kes *Fadiiah Nadwa Fikri & Ors* mahkamah telah merujuk kepada penghakiman *Roshairree Abd Wahab* yang menyatakan:

[34] In *Roshairree Abd Wahab v Mejar Mustafa Omar & Ors* [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39, James Foong J (as he then was) followed *Broome v Cassell & Co Ltd* [1972] AC 1027 and awarded aggravated damages. The head note (9) reads as follows:

An aggravated damages was to compensate the plaintiff for injuries affecting his feelings arising out of the toduous acts of the defendants. In assessing this, all circumstances of the case must be taken into account, including the character of the plaintiff: The plaintiff was entitled to self-respect and dignity. By the acts of the first and second defendants he has suffered humiliation, loss of pride and self-esteem ...

[44] This court considers that aggravated damages are appropriate to compensate the plaintiffs for the injuries to their feelings and the humiliation arising out of the toduous acts of the defendants. SP2 during cross-examination stated 'saya tidak dibenarkan berpakaian lengkap. Disuruh tanggalkan baju dalam'. SP1-SP4 in their witness statement had stated that they were given lock up uniforms of 'sepasang baju dan seluar berwarna oren terang ... Kami juga tidak dibenarkan memakai bra dan seliparjuga kena ditanggalkan'.

[59] Dalam kes *Thompson* mengenai isu ganti rugi teruk, mahkamah telah memberikan pencerahan yang berikut:

There is also a greater problem of awarding exemplary as well as aggravated damages in the class of action under consideration because the very circumstances which will justify the award of aggravated damages are probably the same as those which make it possible to award exemplary damages. This accentuates the risk of a double counting.

Aggravated damages can only be awarded where they are claimed by the plaintiff and where there are aggravating features about the defendant's conduct which justify the award of aggravated damages.

(8) If the case is one in which aggravated damages are claimed and could be appropriately awarded, the nature of aggravated damages should be explained to the jury. Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a highhanded, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted.

[60] Sebagaimana yang diterangkan sebelum ini, tidak wujud keterangan yang menunjukkan bahawa terdapat apa-apa tindakan defendan pertama yang memalukan atau, menjatuhkan harga diri atau maruah plaintif (perenggan 49 dan kes *Saul Hamid Pakir Mohamad* dirujuk). Berkenaan perbuatan defendan pertama yang bersifat menekan, sembarangan dan tidak berperlembagaan

A semasa melakukan pemalsuan minit, ia telah dirangkumi dalam pemberian ganti rugi teladan. Berdasarkan penerangan di atas, tuntutan untuk ganti rugi teruk ditolak.

B [61] Perbicaraan kes ini hanya mengambil masa dua hari dan dua orang saksi sahaja yang memberi keterangan. Meskipun ia mengambil masa dua hari, tempoh sebenar perjalanan kes ini adalah untuk beberapa jam sahaja. Pernyataan saksi plaintif panjangnya ialah dua muka surat dan keterangannya pada 25 November 2021 mengambil masa lebih kurang 50 minit. Manakala saksi defendan selesai memberi keterangannya pada 26. November 2021 dalam masa satu jam sahaja. Kes ini tidak melibatkan sebarang isu undang-undang yang rumit atau kompleks. Oleh itu, mahkamah telah memerintahkan agar defendan-defendan membayarkos sebanyak RM25,000 kepada plaintif, yang didapati adalah wajar dan berpatutan.

D KESIMPULAN

E [62] Konklusinya, atas imbalan kebarangkalian, mahkamah ini telah membenarkan tuntutan plaintif terhadap defendan-defendan. D2–4 didapati bertanggung secara vikarius atas perbuatan salah yang dilakukan oleh defendan pertama dalam perjalanan pekerjaannya. Ganti rugi am yang dibenarkan untuk penahanan salah ialah RM2,000 sehari bagi 106 hari yang berjumlah RM212,000. Manakala ganti rugi teladan yang diberikan berjumlah RM30,000 dengan kos sebanyak RM25,000.

F *Tuntutan dibenarkan.*

Dilaporkan oleh Nabilah Syahida Abdullah Salleh

G

H

I